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No.

In the Supreme Court of the United States

October Term, 1982

BOARD OF PUBLIC UTILITIES OF SPRINGFIELD, MISSOURI, d/b/a CITY UTILITIES, and CITY OF SPRINGFIELD, MISSOURI,
Petitioners,

vs.

BILL'S COAL COMPANY, INC. and WILLIAM D. PATCH, SAVANNA LEE PATCH, LLOYD F. BURKDOLL, ANNA FAYE BURKDOLL, JOHN E. BURKDOLL, and VIRGINIA L. BURKDOLL, all the general partners of and d/b/a CHEROKEE COAL COMPANY, a general partnership,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

WHETHER EQUITABLE RELIEF MUST BE DENIED WHEN A PARTY AND ITS COUNSEL ENGAGE IN THE USE OF FALSE STATEMENTS IN THE COMPLAINT, IN SWORN TESTIMONY UNDER OATH, IN ANSWERS TO INTERROGATORIES, IN AFFIDAVITS AND IN PLEADINGS, FOR THE PURPOSE OF OBTAINING AND PRESERVING INJUNCTIVE RELIEF COMMANDING CONTINUED SPECIFIC PERFORMANCE. *Precision Instrument Mfg. Co., et al. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806 (1945).

WHETHER THE PUBLIC INTEREST DEMANDS THE COURT OF APPEALS, TENTH CIRCUIT, RECOGNIZE, MAINTAIN AND ENFORCE THE EQUITABLE PRINCIPLE THAT A PARTY SEEKING EQUITY DO SO WITH "CLEAN HANDS" AS A PREREQUISITE TO RECEIVING EQUITABLE RELIEF.

WHETHER THE COURT OF APPEALS, TENTH CIRCUIT, MAY EXCUSE "BAD FAITH" AND "FRAUD" IN THE PERFORMANCE OR ENFORCEMENT OF A CONTRACT IN DIRECT CONTRAVENTION OF THE MANDATE OF THE UNIFORM COMMERCIAL CODE, MISSOURI LAW, AND CONTROLLING CASE LAW IN OTHER CIRCUITS WHICH REQUIRES "GOOD FAITH" AND "FAIR DEALING" IN THE PERFORMANCE AND ENFORCEMENT OF ALL RIGHTS AND DUTIES UNDER A CONTRACT.

The caption of the case contains the identity of all interested parties.

II

WHETHER ONE PARTY TO A CONTRACT MAY, THROUGH BAD FAITH AND FRAUDULENT DESIGN, ATTEMPT TO DEPRIVE ANOTHER OF A VITAL RIGHT UNDER A CONTRACT WITHOUT COMMITTING A BREACH OR REPUDIATION OF THE CONTRACT.

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No.

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BOARD OF PUBLIC UTILITIES OF SPRINGFIELD, MISSOURI, d/b/a CITY UTILITIES, and CITY OF SPRINGFIELD, MISSOURI,
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vs.

BILL'S COAL COMPANY, INC. and WILLIAM D. PATCH, SAVANNA LEE PATCH, LLOYD F. BURKDOLL, ANNA FAYE BURKDOLL, JOHN E. BURKDOLL, and VIRGINIA L. BURKDOLL, all the general partners of and d/b/a CHEROKEE COAL COMPANY, a general partnership,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The majority opinion of the Court of Appeals, Tenth Circuit, dated July 6, 1982, is reported as 682 F.2d 883 (1982) and is reproduced as Appendix A hereto; the dissent of Barrett, Circuit Judge, filed July 14, 1982, is reproduced as Appendix B hereto; the Order dated August 9, 1982 denying the Petition for Rehearing (Suggestion For Rehearing *En Banc*) is reproduced as Appendix C hereto. The District Court Orders dated September 21, 1981, January 28, 1982 and January 29, 1982, are reproduced as Appendices D, E and F, respectively.

JURISDICTION

The opinion of the Court of Appeals, Tenth Circuit, was filed July 6, 1982; Petition for Rehearing was denied August 9, 1982. Jurisdiction is asserted upon the authority of 28 U.S.C. §1254(1).

STATUTES INVOLVED

1. Uniform Commercial Code §1-203 (20A Mo. Ann. Stat., §400.1-203 (Vernon's)) provides:

> **"Obligation Of Good Faith.**
>
> Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."

2. Uniform Commercial Code §1-201(19) (20A Mo. Ann. Stat., §400.1-201(19) (Vernon's)) provides:

> " **'Good faith'** means honesty in fact in the conduct or transaction concerned."

3. Uniform Commercial Code §2-610 (20A Mo. Ann. Stat., §400.2-610 (Vernon's)) provides:

> **"Anticipatory Repudiation**
>
> When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may
>
> (a) for a commercially reasonable time await performance by the repudiating party; or
>
> (b) resort to any remedy for breach (Section 2-703 or Section 2-711), even though he has

notified the repudiating party that he would await the latter's performance and has urged retraction; and

(c) in either case suspend his own performance or proceed in accordance with the provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2-704)."

STATEMENT OF THE CASE

This case involves a coal purchase-supply agreement between Petitioners, the City of Springfield, Missouri and the Board of Public Utilities of Springfield, Missouri (hereafter referred to as the "City") and Respondents, Bill's Coal Company, Inc. and the general partners of Cherokee Coal Company (hereafter referred to as the "Coal Company"). Jurisdiction of the District Court was based on 28 U.S.C., Section 1332.

Of particular significance to the merits of the relief requested is the District Court's Findings of Fact and Conclusions of Law dated January 28, 1982 (Appendix E) beginning at page A51 through page A53, and at page A59 beginning "VI. *Purchaser's Bad Faith/Repudiation Claims,*" through the top of page A68, and page A74.

In 1970 the parties entered into a coal contract whereby the Coal Company agreed to supply certain of the City's coal requirements. The contract between the parties was amended numerous times, culminating in the "1979 Amendment" which was negotiated in April, 1979 and which is the subject of this dispute.

The 1979 Amendment is a variation of a requirements contract requiring the City to purchase a minimum of

495,000 tons of coal per year and a maximum of 605,000 tons of coal per year.

The 1979 Amendment changed, among other things, the method for determining the price to be charged for coal and the manner in which the City could cancel the agreement if the Coal Company's price for coal became excessive. It provided the Coal Company with absolute discretion in setting its price, but provided the City with a right to cancel the contract if it could obtain coal from a qualified competitor at a price of 25% less than the Coal Company's price.

The principal draftsman of the amended contract was Mr. Richard W. Lowry, an attorney representing the Coal Company in the negotiations. Mr. Lowry, as well as other counsel for the Coal Company, recognized after the final negotiating session (on April 12, 1979), but prior to the signing of the amended agreement by the parties, that the language in the proposed agreement "could be read" as requiring a comparison of the Coal Company's F.O.B. mine price excluding transportation charges, to a competitor's F.O.B. mine price plus the cost of transportation to the City of Springfield in order to invoke the 25% cancellation clause. The principals of the Coal Company and its counsel also acknowledged at that time that such an interpretation would be contrary to the actual agreement.

Since transportation was a significant portion of the total cost, a comparison of the Coal Company's price excluding transportation to a competitor's price including transportation would have made it virtually impossible for the City to ever cancel the agreement. (Appendix E, page A61, Para. 7.)

If the Coal Company were successful in requiring such a price comparison it would be in an extremely

favorable position since it had absolute discretion in setting its price, and the City would, for all practical purposes, have no right to cancel the agreement. The City and its ratepayers, on the other hand, would be in the extremely precarious position of being at the mercy of the Coal Company.

For an undisclosed reason, the Coal Company chose not to advise the City of this "possible" interpretation, but chose instead to remain silent. As a result, the contract was executed by both parties containing Mr. Lowry's proposed language.

Later that year (in the fall of 1979), the Coal Company set into motion a carefully conceived plan to attempt to force the City to compare its F.O.B. mine price (*excluding* transportation) to a competitor's F.O.B. mine price *including* transportation in order to cancel the agreement.

On December 29, 1979, the President of the Coal Company and its counsel hand-delivered a letter to the City whereby the Coal Company simultaneously increased its price for the next fiscal year by 43% and demanded that the City compare the Coal Company's F.O.B. mine price to a competitor's price plus transportation in order to exercise the 25% cancellation clause. The City, knowing that such a requirement was contrary to the actual agreement, proceeded to obtain bids, and being of the opinion that it had a bid which entitled it to cancel the contract under the 25% cancellation provision, sent a notice of cancellation to the Coal Company and on March 28, 1980 filed a complaint for declaratory judgment seeking an interpretation of the agreement and cancellation of the contract.

The Coal Company continued with its plan to deprive the City of its right to cancel the agreement and responded with a separate action on April 8, 1980 seeking

specific performance and injunctive relief to compel performance of the contract and to prevent the City from cancelling the contract unless it compared the Coal Company's F.O.B. mine price to a competitor's price plus transportation. The president of the Coal Company, Mr. James F. Hirlinger, filed an affidavit attesting to the truth of the matters set forth in the Complaint (i.e., that a comparison of the Coal Company's F.O.B. mine price to a competitor's price plus transportation was required). Mr. Hirlinger later admitted under oath that such a comparison was neither intended nor required.

The Coal Company was successful in obtaining an injunction and the City was ordered to perform the contract. The Coal Company thereafter furthered its plan by repeating its contentions regarding the price comparison in its First Amended Complaint, Second Amended Complaint and Third Amended Complaint, affidavits, interrogatory answers and testimony under oath.

The Court found:

> "8. The continuation of the Seller's plan is evidenced by Seller's Second Amended Complaint, filed July 16, 1980 and Seller's Third Amended Complaint, filed September 5, 1980. Both amended complaints assert that the take-out clause in the 1979 Amendment required Purchaser to compare Seller's F.O.B. mine price to a competitor's price plus transportation.
>
> 9. When Mr. Hirlinger was deposed in December of 1980, he continued to assert on behalf of Seller . . . the take-out comparison. . . ." (Appendix E, page A61.)

In response to a request for production of documents filed by the City, the Coal Company inadvertently produced documents partially revealing the bad faith nature of its plan to impose the aforementioned price comparison

upon the City and its ratepayers. The Coal Company prohibited further discovery in connection with those documents alleging that they were protected by the attorney-client privilege. Notwithstanding the Coal Company's efforts to conceal the plan, its likelihood of success began to diminish.

In a hearing on the City's motion for summary judgment, the District Court stated that the price comparison was going to have to be on the "same terms".

The Coal Company realized that its position was (in the words of Mr. Lowry) "no longer tenable" and conceded that it had known all along that the contract did not require such a price comparison, but notwithstanding, did nothing to abandon its position until it became apparent, shortly before trial, that the plan would not succeed. The District Court found:

> "11. Seller maintained its position regarding the take-out price comparison until the first Pretrial Order was filed on April 28, 1981. Seller had decided that it 'was not a tenable position' to continue to maintain (Lowry Deposition, p. 510). The Court has voiced its concern over Seller's assertion of a position which it knew to be inapposite to the intention of the contracting parties." (Appendix E, pages A61-A62.)

Thereafter, Coal Company, in the Pretrial Order of April 28, 1981, set forth what it claimed to be the actual agreement and true intention of the parties.

In the Pretrial Order, Coal Company asserted for the first time that, consistent with the District Court's statement in the hearing on the motion for summary judgment, the comparison was to be on an "equal basis" and that the actual agreement and true intention of the parties was contrary to its earlier position and actually

required a comparison of its price plus transportation to a competitor's price plus transportation.

Regardless of this last minute confession, the Coal Company, for nearly one and one-half years, refused to honor the contract according to its terms and sought through its bad faith position on the required price comparison and through mandatory injunctive relief to effectively deprive the City of its right to cancel the contract. The Coal Company came forward with the truth only when it was clear that the plan was no longer tenable.

The City contended that the Coal Company's bad faith conduct in attempting to deprive it of its right to cancel the contract if the Coal Company's price became excessive constituted a breach and repudiation of the contract. The District Court agreed.

The following Findings of Fact and Conclusions of Law by the District Court are particularly noteworthy:

> "On December 10, 1979, Mr. Lowry wrote Mr. White (General Counsel to Purchaser) a letter confirming the substance of their telephone conversation. In a blind postscript to that same letter (Plaintiff's Exhibit 36) sent to (the principals of the Coal Company) Mr. Lowry reminded Seller of 'the plan' Seller was preparing in regard to the upcoming bid solicitation by Purchaser. The 'plan' was to demand and require that Purchaser compare Seller's f.o.b. mine price to a competitor's price including transportation to the City of Springfield in order to terminate the contract under the 'take-out' clause." (Appendix E, page A51.)
>
> . . .
>
> "The purpose of making the demand was to put the Coal Company in a more favorable position (Lowry deposition, pp. 446-457). Although there is some tes-

timony that Seller adopted its 'plan' for use as a negotiating tool, Seller's latter actions are inconsistent with such a contention. The Court finds no excuse or justification for Seller's December 28, 1979 demand upon Purchaser. Seller knew and in fact admits that it has always known the intended meaning of the price comparison in the take-out clause. The Court further finds that Seller knew that it was not entitled to the price comparison upon which it was insisting." (Appendix E, page A60, Paragraph 3.)

. . .

"Seller intended to impose on Purchaser a condition which was not part of the original contract and demanded that it would treat non-compliance with that additional condition as breach of the contract. Accordingly Seller has repudiated the 1979 Amendment by manifesting a positive intention not to perform the contract according to its terms." (Appendix E, page A64, Paragraph 7.)

. . .

"Seller's actions were not honest mistakes. Seller was attempting to gain unfair advantage by its demands on Purchaser. It was a calculated plan which Seller carried out from December of 1979 until April of 1981." (Appendix E, page A67, Paragraph 16.)

. . .

"There can be no doubt that Seller failed to act in good faith in this respect." (Appendix E, page A61, Paragraph 10.)

. . .

"If Seller had been successful in requiring Purchaser to use the price comparison demanded by Seller, it would have been virtually impossible for any qualified

bidder to take Seller out of the contract. Seller's 'plan' gave Seller even more latitude in setting its contractual price than the contract already provided."

(Appendix E, page A61, Paragraph 7.)

. . .

"This Court cannot condone Seller's conduct. To allow Seller to retain the benefits of the contract would, in the opinion of this Court, result in an injustice. The Court concludes that Seller's violation of its contractual obligations of good faith constitutes a breach of the 1979 Amendment. Because of Seller's breach and repudiation, Purchaser is entitled to the remedy of cancellation." (Appendix E, page A68.)

The District Court dissolved the preliminary injunction by separate order on January 29, 1982 (Appendix F) upon its decision dated January 28, 1982 (Appendix E).

Notwithstanding the District Court's extensive Findings of Fact and Conclusions of Law on the Coal Company's bad faith, the Court of Appeals reinstated the preliminary injunction and ordered continued specific performance of the 1979 Amendment.

REASONS FOR GRANTING THE WRIT

The Court of Appeals, Tenth Circuit, has rendered a decision so repugnant to the principles of equity and fair play firmly established by the Supreme Court of the United States and other Circuit Courts, thereby departing from the usual and accepted course of judicial proceedings, as to necessitate the intervention of this Court.

By ordering the injunction reinstated and ordering continuing specific performance of the contract despite

the Coal Company's "bad faith conduct" (perpetuated by motions for injunctive relief supported by false affidavits, false testimony under oath, false answers to interrogatories, false pleadings, etc.), the majority ignored the necessity of parties seeking equity to do so with clean hands, and enunciated a standard of conduct for parties in litigation totally devoid of any requirements of "truth", "honesty" or "good faith".

The majority opinion commits two very basic, yet very grave errors. The first error is that the Court of Appeals' decision fails to recognize that the Coal Company's bad faith fraudulent conduct has a direct bearing upon its right to equitable injunctive relief. The second error is the Court's failure to recognize that bad faith or fraudulent conduct of one party which attempts to deprive another of his rights under a contract (or to prevent, hinder, or frustrate the contract as a whole) constitutes a breach or repudiation of the contract.

The Coal Company asserted its so-called "interpretation" of the contract admittedly fully knowing the "interpretation" was false. Their false assertions were not limited to the City, but were made in federal court pleadings and testimony.

The Court of Appeals, however, ruled that ". . . if the interpretation might prevail in a court of law, the Seller [Coal Company] has a right to urge it". The Court of Appeals' standard not only totally excuses Coal Company's and its counsel's conduct in this case, but encourages disregard for the pronouncements of the Supreme Court and other Circuit Courts, as well as the standards and dignity of the court system and counsel's obligation under the Code of Professional Responsibility and Federal Rules of Civil Procedure. Therefore, this Court should exercise its power of supervision, grant the Writ of Certiorari, and reverse the Court of Appeals.

The Supreme Court enunciated the appropriate standard in *Precision Instrument Mfg. Co., et al. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814-15 (1945) when the Court stated:

> The guiding doctrine in this case is the equitable maxim that "he who comes into equity must come with clean hands." This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be "the abetter of iniquity." Bein v. Heath, 6 How. 228, 247, 12 L.Ed. 416. Thus while "equity does not demand that its suitors shall have led blameless lives," Loughran v. Loughran, 292 U.S. 216, 229, 54 S.Ct. 684, 689, 78 L.Ed. 1219, as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue. Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 245, 54 S.Ct. 146, 147, 78 L.Ed. 293; Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 387, 64 S.Ct. 622, 624, 88 L.Ed. 814; 2 Pomeroy, Equity Jurisprudence (5th Ed.) §§ 397-399.

While the Court of Appeals concluded that ". . . this type of bad faith behavior is not to be regarded as a contract breach or repudiation" (Appendix A, page A7), it elected to ignore City's argument and legal authority that Coal Company's acknowledged bad faith and unclean hands precludes Coal Company from obtaining equitable relief.

The majority's decision on this issue is in direct conflict with the law as pronounced by the Supreme Court of the State of Missouri (the law applicable in this diversity action), the statutory law of the State of Missouri as enacted through the adoption of the Uniform Commercial Code, and in direct conflict with the law as stated by the Missouri Supreme Court, which applies for the purpose of this decision.

The Coal Company is undeniably guilty of engaging in a bad faith fraudulent scheme to deprive the City of its right of termination, thereby leaving the City and its ratepayers at the Coal Company's mercy.

The District Court rightfully found that such conduct constituted a breach and repudiation of the contract and dissolved the injunctive relief it had previously granted. On appeal, the majority opinion held that this "type of bad faith conduct" does not constitute a breach or repudiation of the contract, and ordered that the injunction in favor of the Coal Company be restored.

However, the dissenting opinion by the Honorable James E. Barrett (Appendix B) concurred with the District Court's finding that when a party practices "fraud" as did the Coal Company, a breach and repudiation has occurred and the injunctive relief should be dissolved.

The majority's conclusion that bad faith fraudulent conduct cannot operate as a breach or repudiation ignores the opinions of other circuits and the Uniform Commercial Code, which clearly provide that the obligation of good faith applies to performance and enforcement of rights and duties under a contract and that a bad faith untenable construction of a contract can constitute a breach and repudiation of a contract as can a bad faith demand for more in the way of counter performance than is required under the contract.

Section 1-203 of the Uniform Commercial Code, Mo. Ann. Stat., Section 400.1-203 (Vernon's) provides:

> "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."

The Official Comments to Section 1-203 provide in pertinent part:

> "This section sets forth the basic principle running throughout this Act. The principle involved is that in commercial transactions good faith is required in the performance or enforcement of all agreements or duties."

Section 1-201(19) of the Code, Mo. Ann. Stat., Section 400.1-201(19) provides:

> "Good faith means honesty in fact in the conduct or transaction concerned."

The Eighth Circuit Court of Appeals, in applying Missouri law in *Bunge Corp v. Recker*, 519 F.2d 449 at 452 (8th Cir. 1975), stated:

> "Bad faith generally implies or involves actual or constructive fraud or a design to mislead or deceive another. It is an action not prompted by an honest mistake but rather by some interested or sinister motive. We are convinced that a lack of 'good faith' as defined in the Code means some type of affirmative action consisting of at least constructive fraud or a design to mislead or deceive another."

Common sense would dictate that a breach of the obligation to act in good faith is a breach of an implied condition of the contract and thus a breach of the contract itself.

See the Restatement (Second) of Contracts:

> "e. Good faith in enforcement. The obligation of good faith and fair dealing extends to the assertion, settlement and litigation of contract claims and defenses. See, e.g. Sections 73, 89. The obligation is violated by dishonest conduct such as conjuring up a pretended dispute, *asserting an interpretation contrary to one's own understanding, or falsification of facts.*" Restatement (Second) of Contracts, Sec. 205 (1979) at page 102. (Emphasis added.)

Whether the Coal Company's conduct is classified as "performance" or "enforcement" it was clearly a plan designed to mislead or deceive the City and the District Court into requiring a comparison of its F.O.B. mine price to a competitor's in order to invoke the cancellation clause of the contract.

The majority opinion fails to recognize the distinction between the advancement of a "good faith" yet erroneous construction which does not constitute a breach or repudiation and a "bad faith" untenable construction which does.

The Tenth Circuit previously stated in *Walker v. Shasta Minerals and Chemical Co.*, 352 F.2d 634, 638 (10th Cir. 1965):

> ". . . an offer to perform made in accordance with the promissor's interpretation of the contract, if made in good faith although it may be erroneous, is not such a clear refusal to perform as to constitute an anticipatory breach."

The Tenth Circuit's decision in *Walker* contains one very critical qualification, that being that the erroneous interpretation be "made in good faith". The opinion in *Walker* anticipated and articulated the principles of good

faith, honesty and fair dealing which form the very cornerstone of the Uniform Commercial Code.

The Eighth Circuit, following the principles set forth in *Walker*, held in *Peter Kiewit Sons' Co. v. Summit Constr. Co.*, 422 F.2d 242, 257 (8th Cir. 1969) that a *bad faith* interpretation or construction constitutes a breach:

> "As stated in *W.J. Walker v. Shasta Minerals & Chemical Co.*, 352 F.2d 634, 638 (10th Cir. 1965), an offer to perform made in accordance with the promissor's interpretation of the contract, even though erroneous, is not such a clear refusal to perform as to constitute an anticipatory breach *if that offer was made in good faith. Kiewit's lack of good faith is evidenced from its $143,000.00* offer, which was but 10% of Summit's estimate . . . and its June 29 comment to Summit that the latter could do better with the other subs than it could with Kiewit arranging some backfill settlement." (Emphasis added.)

In another case citing *Walker*, the Ninth Circuit, in *Pacific Coast Eng. Co. v. Merritt-Chapman & Scott Corp.*, 411 F.2d 889, 894 (9th Cir. 1969), stated:

> "Generally, when there is a disagreement as to the meaning of terms in a contract, one party's offer to perform in accordance with its interpretation is not itself an anticipatory breach (cite omitted).
>
> . . .
>
> If the offer appears to be made in the good faith belief that the offeror's interpretation is correct, that will be evidence of his continuing adherence to the agreement (cites omitted)."

However, when the interpretation is advanced in bad faith, it is inconsistent with a "continuing adherence to the agreement" and is evidence that the party is repudiating the agreement.

In holding that "this type of bad faith behavior" cannot constitute a breach or repudiation, the majority opinion again fails to seize upon the significance of the bad faith nature of the conduct, and fails to apply the principles of established Missouri law as enunciated in Mo. Ann. Stat. Sec. 400.2-610 (Vernon's) governing anticipatory repudiation and the case of *Miran Investment Co. v. Medical West Bldg. Corp.*, 414 S.W.2d 297 (Mo. 1967).

This case does not involve a good faith honest mistake over the terms of the contract, but rather involves a deliberate and carefully conceived plan to impose a condition of cancellation (i.e., a comparison of a competitor's F.O.B. mine price plus transportation to the Coal Company's F.O.B. mine price) on the City which was not part of the original agreement.

In so doing, the Coal Company was guilty of demanding performance of conditions which it knew were beyond the terms of the agreement.

Under the existing Missouri law, such conduct clearly constitutes a breach and repudiation of the contract.

See the Missouri Supreme Court's decision in *Miran Investment Co. v. Medical West Bldg. Corp., supra,* at 302-303.

Section 2-610 of the Code, Mo. Ann. Stat. Sec. 400.2-610 (Vernon's), *Comment 2,* states the same rule of law regarding a demand for performance beyond the terms of the agreement. The Eighth Circuit, in *National Farmers Organization v. Bartlett Feed & Grain Co.*, 560 F.2d 1350, 1356-57 (8th Cir. 1977), in applying Missouri law, adopted *Miran.*

Accord 1A Corbin, *Contracts,* Sec. 85, page 367 (1950 & Supp. 1971):

> "An attempt to vary the terms of a contract may be made in such a way, however, as to be reasonably understood as a repudiation and to be in itself an actionable breach."

See also, 5 Corbin, Sec. 538, page 73:

> "If A used or understood the words in a particular sense and B in fact knew that he did, it is regarded as 'fraudulent' for B to try to hold A in accordance with a different meaning, however 'normal' or common that meaning may be."

The majority opinion is clearly wrong in its statement that "this type of bad faith behavior is not to be regarded as a contract breach or repudiation".

See also, *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. 1974):

> "Insisting on terms not in the contract has been held in New York to constitute an anticipatory repudiation (cites omitted)." *Supra* at 290.

See also, *REA Express, Inc. v. Interway Corp.*, 538 F. 2d 953, 955 (2d Cir. 1976):

> "Under New York law, insistence upon terms which are not contained in a contract constitutes an anticipatory repudiation thereof (cites omitted)." *Supra* at 955.

CONCLUSION

The Court of Appeals' failure to insist that a party and its counsel seeking equitable relief should do so with clean hands, if not corrected, will serve to undermine the standard of honesty and fair dealings expected and required in the federal courts.

Therefore, the Writ of Certiorari to the Court of Appeals, Tenth Circuit, should issue, the decision to reinstate the preliminary injunction should be reversed and the case remanded.

Respectfully submitted,

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